THE HON'BLE SRI JUSTICE T.CH.SURYA RAO

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

Writ Petition No.9493 of 1999

(per the Hon'ble Sri Justice T.Ch.Surya Rao)

Dated 11-09-2006

Between:

Ghousia Bano and others .. Petitioners

and

The Special Court under A.P. Land Grabbing (Prohibition) Act, Hyderabad through its Chairman and another .. Respondents

THE HON'BLE SRI JUSTICE T.CH.SURYA RAO

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

Writ Petition No.9493 of 1999

ORDER: (per the Hon'ble Sri Justice T.Ch.Surya Rao)

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In the instant writ petition petitioners seek a writ of Certiorari to quash the judgment dated 24-03-1999 passed by the learned Special Court under the A.P. Land Grabbing (Prohibition) Act (for short, 'the Act') Hyderabad in L.G.C.No.194 of 1996.

The second respondent in the writ petition filed the application in L.G.C.No.194 of 1996 against the petitioners before the Special Court under Section 8 (1) of the Act for declaring the respondents as land grabbers and for eviction of the respondents from the petition schedule land and for possession thereof. According to the applicant the land in an extent of 398 square yards covered by new Sy.No.49, Block-C, Ward Nos.2 to 6 was classified as graveyard. During the survey operations conducted by a Survey Commissioner, appointed by the Governor, Government of Andhra Pradesh, under Section 4 of the Wakf Act, there used to exist a Dargah called as 'Dargah Hazrat Tajub Shah Karamat Shah' situate at Qazipura, Hyderabad, with open space admeasuring 398 square yards and that the said Dargah was an ancient Dargah as evident from the Town Survey Land Records, which

clearly show that the land in new Sy.No.49, Ward Nos.2 to 6, Block-C of Hyderabad city, Charminar Mandal, has been classified as graveyard. The respondents 1 to 3 without any manner of right and entitlement have grabbed the entire extent of land and constructed two mulgies with two tin sheds thereon; they erased the number of tombs and started using the land as cattle sheds; and spread the cow dung and thus they converted the graves into an open land with an illegal desire to enrich themselves.

The respondents resisted that application by filing a counter. It was their case *inter alia* in the counter that they are the rightful owners and possessors of the petition schedule property right from 1973 under a valid agreement of sale from its lawful owners and possessors having paid the entire sale consideration. The first respondent was in possession of the entire land till she transferred an extent of 173.88 square yards under a valid registered sale deed dated 26-08-1982 in favour of respondent No.3. The mulgies have been constructed by the third respondent thereon. They denied the existence of any Dargah over the petition schedule property, which was in their possession. It was their further case that the Survey Commissioner's report did not pertain to the petition schedule property at all and the property that was covered by the gazette notification and the service settlement report was totally different property having different boundaries. Therefore, petition schedule property was not the wakf property or Dargah property and there was no mutavalli at all.

At the time of enquiry before the Special Court, two witnesses were examined on the side of the applicant, besides getting Exs.A1 to A5 documents marked. Equal number of witnesses were examined on the side of the respondents, besides Exs.B1 to B26 got marked on their side. Appreciating the evidence thus adduced, both oral and documentary, on either side, the learned Special Court was of the view that the applicant was the owner of the application schedule land and that the rival title set up by the respondents was not true and valid and

consequently directed the respondents to vacate the land. Having been aggrieved by the said findings, the respondents are now seeking to assail the same in the instant writ petition.

Sri M.V.Suresh Kumar, learned counsel appearing for the writ petitioners, represents that the applicant has no *prima facie* case since obviously Ex.A1 gazette notification does not cover the petition schedule property and therefore the application must fail on that ground and there is no need for the respondents to prove their title. The learned counsel further represents that having regard to the fact which is demonstrably shown that the property as shown in Ex.A1 gazette notification is different from the petition schedule property, the discrepancies, if any, in the evidence and the inconsistency, if any, in the pleading and proof are of no consequence, inasmuch as the burden shifts to the respondents under Section 10 of the Act only when the applicant is able to show a *prima facie* case. According to the learned counsel, the property, which is in the possession of the respondents, has not been shown to be the property of Dargah; the existence of which itself is in doubt and the writ petitioners' possession, therefore, cannot be disturbed.

The learned standing counsel representing the wakf represents that the property covered by Ex.B4 plan is identical to the property covered by Ex.A4 plan and in view of Ex.A2, entry in Town Survey Land Register, the applicant is able to show a *prima facie* case.

The points that arise for our determination, having regard to the competing claims, are:

(1) Whether the petition schedule property is a wakf property; and

(2) Whether the second respondent-wakf is able to show *prima facie* case in its favour.

Inter alia in the application as against columns 9 to 12 it has been mentioned that the property in question was a graveyard covered by new Sy.No.49, Ward Nos.2 to 6, Block-C ad measuring 398 square

yards with the following boundaries: North: by the property of neighbour; South: by the house of Sri Husamuddin and Shaik Abdulla; East: by the house of G.M.Mohiuddin; and West: by lane. This property thus described in the petition according to the concise statement appended thereto, as per the report of the Survey Commissioner, appointed by the Government of Andhra Pradesh under Section 4 of the Wakf Act, was a Dargah called 'Dargah Hazrat Tajub Shah Karamat Shah' situate at Qazipura, Hyderabad with open space ad measuring 398 square yards and that the said Dargah was an ancient Dargah and in the Town Survey Land Records it was shown as a graveyard. In proof thereof, the second respondent places reliance upon Exs.A1 and A2. Ex.A1 is the A.P. gazette published on 09-06-1982. This document contains at Sl.No.1199. A notification pertaining to the wakf. As per the particulars mentioned therein *inter alia* the wakf was 'Dargah Hazrat Tajub Shah Karamat Shah' No.20-7-172, Qazipura, with open space ad measuring 398 square yards with the following boundaries:

North : House No.20-7-172;

South : House of Qairuddin;

East : House of Abdul Qader; and

West : 20-7-176.

On a perusal of the schedule contained in the application and the schedule as mentioned in the gazette, putting them in the juxtaposition it may apparently show that both of them were not tallying. Ex.A2 is the extract of Town Survey Land Register. The entry therein shows that Sy.No.49 whose extent is 0.03 hectares-48 square meters pertains to the graveyard. The learned counsel for the writ petitioners vehemently contends that the extent is not tallying with the extent as mentioned in the application. The extent as mentioned in Ex.A2 is 0.03 hectares-48 square meters. In the petition schedule, the extent shown is 398 square yards. One thing, which is obvious, is that this extent either as mentioned in the application or as mentioned in

Ex.A2 is in respect of the vacant land of the graveyard that is the Dargah as per the application averments. Endeavour has been made on the part of the writ petitioners to show that the property covered by House No.20-7-172 is correlated to T.S.No.43 but not 49 by filing Ex.B6 and Ex.B7. Even the existence of Dargah has been denied with reference to the town survey plan filed on the side of the applicant, second respondent, in Ex.A5. Ex.B7 sketch shows T.S.No.43, T.S.No.39 and T.S.No.49. The document leads us nowhere. It is apt here to consider Ex.A4 and Ex.B4. Ex.A4 is the plan prepared by the surveyor of the wakf board. Ex.A3 is the R.O.L. issued by the Inspector of Survey and Land Records. Ex.A3 shows the sketch of town survey No.49, Ward Nos.2 to 6, block-C. Ex.A4 is the plan showing Dargah, open area and the mulgies appearing therein. The authenticity of these two documents has not been assailed at least by putting a suggestion in the cross-examination of P.W.1 through whom these documents have been introduced. Ex.B1, on the other hand, is the agreement of sale dated 10-10-1973, under which the first petitioner is said to have purchased the property from, one, Mohd. Habeebullah Khan, S/o Mohd. Abdul Khan claiming to be the original owner of the property in question. The plan annexed thereto appears to be identical to the sketch drawn in Ex.A4 and the R.O.M. Ex.A3. In fact, R.W.1 in his evidence categorically admitted that Ex.B4 and Ex.A4 tallies. Thus, from the documentary evidence in Exs.A3, A4, B1 and oral evidence it is obvious that the petition schedule property and the property covered by Ex.B1 are one and the same. We are further fortified in the said observation by a comparative chart drawn by the writ petitioners showing in juxtaposition the description of the property covered by Ex.A1, covered by the petition schedule, and covered by Ex.B1. A mere glance with the said comparative chart shows that there has been no difference in between the description of the petition schedule property and the description of the property covered by Ex.B1. It is no doubt true that the property covered by the petition

schedule in Ex.B1, which is one and the same, is not tallying with Ex.A1 gazette containing the boundaries, except northern boundary, which is shown as House No.20-7-172.

It is sought to be contended before us by the learned standing counsel appearing for the Wakf that the boundaries keep changing and the boundaries as mentioned in Ex.A1 gazette way back in the year 1983 may not be there in the year 1973 or 1996. We are not convinced with the contention of the learned counsel, although there is every force in his contention that the boundaries keep changing, about the western boundary that has been mentioned in Ex.A1. Ex.A1 shows the western boundary as the premises bearing No.20-7-176, whereas in the petition schedule it has been shown as lane and in Ex.B1 it has been shown as road.

Be that as it may, it has been specifically mentioned in the concise statement, as per the survey conducted by the Survey Commissioner appointed by the State Government, that the existence of Dargah which was an ancient one as was evident from the town survey land records, which clearly shows that the land in new Sy.No.49, Ward Nos. 2 to 6, Block-C of Hyderabad city, Charminar Mandal had been classified as graveyard. This statement made *inter alia* in the concise statement is clearly buttressed by the entry in Ex.A2. It is further averred in the concise statement that two mulgies were constructed with two tin sheds on the disputed property, that is further evidenced by Ex.A4 sketch drawn. The fact that the mulgies had been constructed subsequently could be seen from the evidence of R.W.1. Although there was no graveyard in existence on ground, the evidence on the side of P.W.1 shows that the respondents desecrated the graveyard and by tethering cattle covered the same with cow dung so as to make it appear as an open ground. There has been no physical existence of Dargah or the graveyard is obvious from the evidence, but the existence of graveyard cannot be denied having regard to the relevant entry made in Ex.A2 town survey land register.

All this is one aspect. When it is seen the plea and the relevant proof that is sought to be adduced by the writ petitioners, the petitioners who have categorically denied the existence of graveyard and any property belonging to the graveyard, have categorically taken a plea *inter alia* in the counter that they are the rival owners and possessors of the petition schedule property right from 1973 when under a valid agreement of sale the first petitioner purchased the property and when the first petitioner alienated an extent of 173.88 square yards under a valid sale deed in favour of the third petitioner. The petitioners, who have categorically denied the existence of graveyard, claim that the petition schedule property as theirs. When that was the plea specifically taken by them during the course of trial, it is sought to be proved through the evidence of R.W.1 that the property claimed by the applicant is different from the property in occupation of the petitioners. It was their case that the property in question is covered by No.20-7-166/1. According to the evidence of R.W.1 the house bearing No.20-7-166/1 which has been in his occupation was originally owned by his father and after his death and in the partition between himself and his elder brother, he got that property and the property which is towards western side of the said house is a disputed property ad measuring 389 square yards, which was purchased by the first respondent on 10-10-1973 under Ex.B1, agreement of sale from, one, Mohammed Habeebullah Khan, S/o Mohammed Abdul Khan. The petitioners have not traced their vendor's title. No evidence has been produced before the learned Special Court to show that the property in dispute was originally owned by Habeebullah Khan so as to convey a valid title to them. Indeed no title deed has been executed by the so called Habeebullah Khan in favour of the petitioners by means of a regular registered sale deed. Agreement of sale will not convey a title is trite. Title passes only through a valid transfer deed executed in accordance with the provisions of Section 54 of the Transfer of Property Act and 17 of the Registration Act. Want of title is one aspect, but what is to be

seen is that the evidence spoken to on oath by R.W.1 is quite inconsistent with the plea taken by them *inter alia* in the counter. The plea appears to be that petition schedule property is distinct and different from property covered by Ex.A1. Now, the proof seems to be the property claimed by the applicant is different from the property in the occupation of R1 to R3. R.W.1 was so specific in his evidence that the property having Dr.No.20-7-172 was still in existence and it was away from his house and had been in possession of some other persons. Thus, writ petitioners have taken a plea *inter alia* in the counter, which was inconsistent with the proof sought to be produced before the Court. This inconsistency in between the plea and the proof shall have to be considered with the fact that the respondents had no title of the property in dispute and in other words no valid title has in fact been passed in their favour by means of a regular title deed. Nonetheless, obviously they have been in possession of the property.

Well, when according to the writ petitioners the property covered by T.S. No.20-7-172 is in existence and when they have not specifically denied that property is covered by town Sy.No.49, the endeavour on their part to show the property covered by T.S.No.20-7-172 pertains to T.S.No.43 but not 49, cannot be countenanced. Exs.B8, B9, B10, B11, B12 and B13 are the documents filed on the side of the respondents to show that one, Syed Hameedullah is in occupation of the house bearing No.20-7-172 and the said house bearing No.20-7-172 was assessed by the Municipal Corporation of Hyderabad showing the property in occupation by somebody else. Ex.B8 is an entry in the electoral register. This document has not been proved by examining the relevant person, who prepared the electoral list. Of course, Exs.B9 to B13 are the extracts from the assessment registers and they are relevant under Section 35 of the Indian Evidence Act. Exs.B11 and B13 show that the property covered by 20-7-172 and 20-7-173 are exempted. This arouses suspicion as to why this property was exempted from assessment. The Act *inter alia*

contains certain provisions exempting the properties from assessment. The property covered by 20-7-172, once it is shown to have been exempted means that it is not the private property, which is liable to be assessed for taxation. These documents produced on the side of the respondents throw a vail of suspicion on the very factum of the case propounded by the petitioners. The entire endeavour of the petitioners shows that the property in occupation of theirs is covered by Dr.No.206-166/1 and separate assessment numbers have been given to the two mulgies got constructed subsequently after purchase on the disputed property has not been shown to the hilt by examining any competent person from the Corporation. Voluminous evidence produced on the side of the petitioners from Exs.B14 to B26 is of no avail to the petitioners to substantiate their claim having regard to the specific case of R.W.1 in his evidence that the property in their possession is distinct and different from the petition schedule property. It is not only a case where the petitioners have no valid title but they have not shown before the Court, which is clear from doubt that the property is a separate property than the property of the wakf.

The contention of the learned counsel for the petitioners is that the applicant-second respondent must show *prima facie* title over the property and then only the burden shifts as per Section 10 of the Act to the respondents. The statement of law is in accordance with the provisions contained in Section 10 of the Act. As discussed hereinabove, in the concise statement, it was mentioned *inter alia* that the property shown to have been covered by new Sy. No.49 ward Nos. 2 to 6, Block-C of Hyderabad city has been classified as graveyard is amply proved by Exs.A2 and A3. The way in which this document is sought to be avoided by showing the discrepancy in the measurements cannot be accepted. Added to it, it is clearly and demonstrably shown that the petition schedule property and the property covered by Ex.B1 are one and the same. In the petition schedule which has been clearly mentioned that it is covered by new

Sy.No.49 with reference to the boundaries. This new Sy. No.49, as can be seen from Exs.A2 and A3, is a graveyard. Thus, *prima facie* the applicant is able to show that the property in question is that of the graveyard. Having set up the title in themselves the applicant is not able to show the title in themselves. Even the so called Ex.B1 which has not been proved before the Court has not transformed itself into a regular conveyance deed. Obviously, therefore, the petitioners have no title in themselves. Not only that, they have taken a plea and leaving that plea aside have sought to prove in evidence which was inconsistent with the plea. The respondents who categorically claim that the petition schedule property is distinct and different from Ex.A1 property, now claim that the property in their possession is distinct and different from petition schedule property. Such persons, who opt to take inconsistent stands at different stages, cannot be believed. In that view of the matter, we are of the considered view that no illegality that has been committed by the learned Special Court. No error of jurisdiction can therefore be shown which attracts the jurisdiction of this Court under Article 226 of the Constitution of India. Therefore, the prerogative writ cannot be issued in the instant case at the asking of the petitioners.

The learned Special Court while not accepting the case of the respondents therein eventually awarded a compensation of Rs.39,601/- towards mesne profits for having been in illegal occupation of the property. We are afraid, we cannot concur with the said finding. No evidence has been adduced on either side on the issue of profits. Even the Special Court has proceeded on the footing that fixing minimum ground rent at the 50 ps. for square yard on some hypothetical considerations. When the parties have not concentrated and adduced any evidence on the issue, it is not open to the Court to fix the profits on hypothetical considerations. The compensation amount thus arrived at by the learned Special Court at Rs.39,601/- having regard to the paucity of the evidence on record cannot be

sustained under any considerations. Therefore, that shall have to be set aside.

For the above reasons, the writ petition fails and is dismissed. Petitioners are given three months time for vacating the premises. But, under the circumstances, no separate order as to costs.

T.CH.SURYA RAO, J.

G.CHANDRAIAH, J.

11th September, 2006.

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